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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-862

UNITED AIR LINES, INC.,

Appellant,

vs.

GEORGE E. MAHIN, et al.,

Appellees.

On Appeal from the Supreme Court of Illinois

MOTION TO AFFIRM

Appellees, George E. Mahin, Director of Revenue of the Department of Revenue of the State of Illinois, William J. Scott, Attorney General of the State of Illinois, and Adlai E. Stevenson, III, Treasurer of the State of Illinois, by William J. Scott, Attorney General of the State of Illinois, attorney for said appellees, pursuant to Rule 16 of the Revised Rules of the United States Supreme Court, move that the decision of the Illinois Supreme Court

herein be affirmed on the ground that the decision of the Illinois Supreme Court is clearly correct and, therefore, it is manifest that no question so substantial as to warrant further argument is raised.

ISSUES PRESENTED

Appellees respectfully disagree with appellants as to the issues presented as set forth at pages 3 and 4 of Appellant's Jurisdictional Statement, and suggest that appellants more accurately stated the issues presented for review in its brief to the Illinois Supreme Court, where it was stated:

The ultimate issue to be decided by this case is how to apply the Use Tax Act (*Ill. Rev. Stat.* 1967, Ch. 120, §§ 439.1 *et seq.*) to aviation fuel purchased by United in Indiana, brought into Illinois by United, which, after being temporarily stored in ground storage tanks here, is loaded aboard United's aircraft at O'Hare and Midway airports, and is used to propel them on flights in interstate and foreign commerce.* Of decisive importance is the temporary storage provision of the Use Tax Act, *id.*, § 439.3 (6th unnumbered ¶),** which excludes from the application of the use tax:

---

* United pays the Illinois use tax on all fuel loaded on its intrastate flights between Chicago and Moline, so that fuel is not involved in this case.

** Several sections of the Use Tax Act were amended by the Illinois Legislature during 1969, including § 439.3 by Public Act 76-249, Laws 1969, p. . . . These amendments will not be cited except when relevant to the discussion.

"'. . . (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State.'"

A. Issues Raised by the Department's Bulletin of June 3, 1963.

"From the effective date of the Use Tax Act in August 1955, until June 3, 1963, the Illinois Department of Revenue "uniformly and consistently interpreted and applied" the law so as to impose use tax on fuel temporarily stored in Illinois *only to the extent it was actually consumed or burned in or over Illinois.* (Additional Stip., §1.) Correlatively, the fuel loaded in Illinois that remained unburned in the tanks of the aircraft or other vehicle as it crossed the Illinois border leaving the State was treated as within the scope of the temporary storage provision. This approach is known as the "burnoff" rule.

"On June 3, 1963, the Department of Revenue changed its interpretation by a Bulletin (United ("UA") Ex. 3) that would impose Illinois use tax on *all* fuel transferred from ground storage into the fuel storage tanks of a common carrier airplane, railroad engine or truck, regardless whether or not such fuel was actually burned in or over Illinois. The theory of the Bulletin is that the transfer from ground storage is of itself a taxable use which terminates the non-taxable temporary storage.*

---

*The Department does not seek to tax any of the fuel brought into Illinois in the tanks of interstate carriers. Such taxation is specifically prohibited by the Commerce Clause of the Federal Constitution as a burden on interstate commerce. See *Helson & Randolph* v. *Kentucky*, 279 U.S. 245 (1929), and cases cited at p. 64, *infra*.

"This suit challenges the validity of the Department's June 3, 1963, Bulletin, and presents the following issues for review:

"1. Whether the new interpretation in the Bulletin '. . . that temporary storage ends and taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck' is an erroneous and unreasonable interpretation of the temporary storage provision of the Use Tax Act (*id.*, §439.3);

"2. Whether such interpretation, which would treat temporary storage as ended when fuel is loaded in the tanks of a common carrier airplane, railroad engine or truck, but not as ended for fuel or other goods transported from the State by any other means (including for fuel, transportation by pipeline, tank truck, or tank car), is an unreasonable and discriminatory classification against common carriers generally, and against airlines in particular, thereby violating the uniformity requirements of the Revenue Article (Art. IX, § 1) and the Due Process Clause (Art. II, § 2) of the Illinois Constitution and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution;

"3. Whether the application of use tax to all fuel loaded for use in interstate and foreign commerce violates the Commerce Clause (Art. I, § 8, cl. 3) of the Federal Constitution;

"4. Whether the application of use tax to fuel burned outside Illinois constitutes an extra-territorial extension of Illinois' taxing power in contravention of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution."

B. Issues Raised by the Trial Court's Decision.

"The trial court did not decide any of these statutory or constitutional issues. Instead, it held, in effect, that the requirement of the temporary storage provision that the stored property be used "solely" outside Illinois required that United prove that *absolutely none* of the stored fuel had been burned in Illinois by any of its flights since July 1, 1963. The court then found that United had not met this burden of proof. (Opinion, pp. 3-4, 5.)

"The court further held that the temporary storage provision applies only if property stored in Illinois is sold or resold outside the State, but not if the owner himself uses or consumes the property outside the State. (Opinion, p. 6.)

"Both of the trial court's holdings in effect repudiate the burnoff rule."

"The trial court's decision raises the following issues, none of which were briefed or argued by the parties below:

"1. Whether *all* of a quantity of *fungible* goods temporarily stored in Illinois is subject to use tax because a *portion*, even *de minimis* amounts, of such stored quantity is used in Illinois.

"2. Whether the trial court erred in not finding, in accordance with United's uncontroverted evidence, that United's departing aircraft consume in Illinois no, or no more than *de minimis* amounts of, fuel loaded in Illinois.

"3. Whether the temporary storage provision applies only to property which eventually is sold or resold outside Illinois."

* * *

"The foregoing issues must be considered in light of the undisputed fact that only a small portion of the fuel loaded by United in Illinois is, or can be, burned in the State by its departing aircraft."

OPINIONS BELOW

The opinion of the trial court is attached hereto as Appendix "A". The opinion of the Illinois Supreme Court, which affirmed the trial court's opinion, is attached hereto as Appendix "B".

Appellees hesitate to be so presumptuous as to explain to this Court the rationale relied upon by both the trial court and majority of the Illinois Supreme Court in affirming the trial court's decision.

Appellant, in characterizing the decision below, apparently attempts to re-argue the interpretation of the Illinois Use Tax Act that was adopted both by the trial court and by a majority of the Illinois Supreme Court and to represent and re-argue its theory of the so-called "burn-off" proposition. Appellant, in its brief to the court below, talked of many things. It talked of burn-off, of consumption, of "cabbages and kings", of constitutional provisions and theories of temporary storage, but concedes that, if the temporary storage provisions of the Illinois Use Tax Act did not apply to the incidence in question, it is then subject to the Illinois Use Tax.

In its brief before the Illinois Supreme Court, appellant stated at pages 26-27:

> "United concedes that any of the acts of importing fuel, storing it, loading it aboard aircraft, and transporting it from the State each constitute the '. . . exercise . . . of . . . a right or power over tangible personal property incident to the ownership of that property'

(Ill. Rev. Stat. 1967, Ch. 120, § 439.2; *Philco Corp.* v. *Department of Revenue*, 40 Ill. 2d 312, 326-27 (1968), which would constitute a taxable use in this State, except for the temporary storage provision. That provision, and the language introducing it, reads (Ill. Rev. Stat. 1967, Ch. 120, § 439.3 (6th unnumbered para.)):

> 'To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:
>
> '(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and stored here temporarily, is used solely outside this state . . .'

"Four conditions are necessary for the temporary storage provisions to be operative:

(i) the property, i.e., the fuel must be purchased outside the State by the taxpayer;

(ii) it must be brought into the State by the taxpayer;

(iii) it must remain in storage while in Illinois; and

(iv) its eventual use, after storage in Illinois terminates, must be solely outside the State."

Appellees understand that statement to mean that if the temporary storage provision of the Use Tax Act does not apply to appellant, it concedes the taxability of their transactions and that all their other arguments concerning Federal Constitutional questions amount to naught.

American Air Lines, Braniff Air Lines and Northwest Airlines in their brief as *amicus curiae* before the Illinois Supreme Court conceded that the court must disregard the statutory definition of "use" and read into the Act meanings that are not set forth therein in order to reach a decision favorable to the position of the airlines (Brief of Amicus Curiae, pp. 13-14).

Appellees respectfully call to this Court's attention that in the opinion of the trial court it was specifically held that both the Illinois Use Tax Act and the interpretation placed upon it by the Department of Revenue were proper and valid and did not violate any of the State or Constitutional provisions as claimed by appellants (App. A, p. 5).

Appellees also respectfully point out that the decision of the majority of the Illinois Supreme Court rejected the constitutional issues raised by appellant and that even the dissents did not accept the constitutional arguments of United but merely quarreled with the construction of the Act in question as construed by the majority of the Court.

ADDITIONAL STATEMENT OF FACT

Appellees do not concede that there is no controversy as to the facts, and insist that United's statement is not complete and that there is a serious dispute as to the inferences to properly be drawn from those facts.

For example: in the very first paragraph of the Facts, stated by Appellant, (p. 6, Jurisdictional Statement), it is stated:

> "All of the aviation fuel involved in this case is purchased from the Shell Oil Co. and delivered to United in Indiana. The purchase is subject to Indiana gross income tax, currently at a rate of ½% of the purchase price.* The fuel is transported by common carriers to O'Hare and Midway airports in Chicago, where it is stored only for such period as is nec-

---

*Burns Ind. Stat. Ann. tit. 64, ch. 26, §§ 64-2601 to 64-2603. Pursuant to the contract with Shell, United is obligated to pay this tax, which amounted to approximately $403,000 for the period between July 1, 1963 and December 31, 1967, and $150,000 for 1968. The Indiana tax continues to be imposed on such purchases.

essary for purification and United's operational needs. All of it is pumped into aircraft fuel tanks, almost always immediately prior to departures by flights in interstate or foreign commerce.** "

Appellees assert that the purchase is not subject to the Indiana Gross Income Tax at the time the alleged purchase takes place in Indiana, but that Shell Oil Company is obligated to pay a Gross Income Tax to the State of Indiana on all of the sales that it allegedly makes in Indiana, and that the contract referred to in the first footnote on page 6 of the Jurisdictional Statement is part of a scheme to avoid payment of the Illinois Retailers' Occupation Tax. (Ch. 120, Sec. 440, et seq., Ill. Rev. Stat. 1969)

The whole purpose of storing the fuel in Indiana is to create the appearance of a sale of fuel taking place in Indiana so that the parties are subject to the Indiana Income Tax, currently at the rate of ½% of the purchase price, rather than the Illinois Retailer's Occupation Tax or the Illinois Use Tax, both of which taxes are currently at the rate of 5%. Appellees respectfully suggest that a fair interpretation of the facts is as follows:

United Air Lines and American Air Lines purchase turbine jet fuel for their jet-propelled airplanes and aviation gasoline for their piston-driven airplanes from Shell Oil Company (R. 224, 330). Approximately 20% of the turbine fuel is refined at Shell's refineries either at Houston, Texas or Norco, Louisiana. The balance is refined at Shell's refinery at Wood River, Illinois which is located very close to East St. Louis, Illinois. The fuel from Texas and Louisiana is shipped to Wood River where it is commingled with the fuel refined at Wood River (R. 268, 269). This turbine fuel is then transported by Shell from Wood River, Illinois, a distance of 250 miles to storage tanks in East Chicago and Hammond, Indiana (R. 212). It should be

**No intrastate flights are involved in this litigation.

noted that East St. Louis is approximately 280 miles from the Chicago area. The fuel is stored in these facilities, which are owned by Shell Oil Company, until United or American requests fuel. United purchases approximately 18,000,000 gallons of turbine fuel from Shell per month. It pays Shell approximately $1,800,000.00. per month (R. 236). Upon receipt of an order from the agents of United (R. 224), Shell delivers the requested fuel to West Shore pipeline at Hammond, Indiana, for delivery to storage tanks located at Des Plaines, Illinois (R. 216). West Shore is a common carrier pipeline owned by 10 oil companies, with Shell having 20% stock interest in it (R. 216). Through this pipeline the turbine fuel for both United and American is transported to storage facilities located at Des Plaines, Ill. (R. 218, 219). These storage facilities at Des Plaines, Illinois are owned by Shell Oil Company and are leased by Shell to United and American (R. 219). The rental fee paid by the airlines to Shell is determined by the volume of "put through" at the storage facilities (R. 220). At all times to this point, the turbine fuel ultimately to be delivered to United and American is commingled (R. 225, 295). Shell also owns the pipeline which connects the Des Plaines storage facilities to the storage facilities at O'Hare Airport. These pipelines are also leased by Shell to United and American (R. 246, 248, 225). Lockheed Air Terminal Corporation, as agent of United and American, operates and manages the storage facilities at Des Plaines and the pipelines connecting Des Plaines with O'Hare Airport (R. 222, 245, 332). From the time the turbine fuel leaves Shell's facilities at Wood River, Illinois, until it reaches United and American's storage facilities at O'Hare, it is never under the physical control of an employee of either United or American. It would be physically possible for Shell to deliver the fuel in question to the respective airlines at O'Hare Airport (R. 260, 313, 314). It is not until the turbine fuel reaches O'Hare Airport that it is metered to

determine the quantity of fuel being purchased by American and United. At this point at O'Hare, United and American have underground storage facilities respectively under their control independent of Shell Oil Company (R. 334). The storage facilities are owned by the City of Chicago and leased to the airlines (R. 344). It is at this point of metering into the respective storage facilities of United and American at O'Hare that for the first time there is a separation of the turbine fuel as between United and American. As a result of the sale and delivery arrangements heretofore described, United claims it is not liable for any Use Tax and Shell claims it is not liable for any Retailers Occupational tax (hereinafter referred to as R.O.T. tax) on the purchase of turbine fuel involved (R. 324, 325). After the fuel is delivered to the respective airlines at their O'Hare storage tanks, it is then loaded by them into their jet airplanes.

United Air Lines at the time in question had an approximate average of 234 take-offs and 234 landings from Chicago per day (R. 42). Some of these flights were 'through' flights; others were what the industry calls 'short, turn-around' flights (R. 44). On a short turn-around flight, the airplane arrives and, in a relatively short period of time, generally from one to three or four hours, would turn around and proceed to another destination with another flight number (R. 43). On through flights the planes are on the ground for a relatively shorter length of time (R. 45).

United is subject to certain controls by the Federal Aviation Agency (Rept. of Proceedings p. 79). Among these controls exercised by the FAA over airlines under its jurisdiction, is the requirement that they carry a sufficient fuel reserve to permit them to fly to airports beyond their intended destination. It is the contention of plaintiffs-appellants that each of its aircraft on landing has from two to

seven times as much fuel as would be required for it to depart from Illinois (Plaintiff-Appellant's Brief p. 18). United then argues that since the reserve fuel is at a colder temperature when the aircraft is re-fueled a stratification takes place causing the colder reserve fuel to rest on the bottom and the warmer, newly-inserted fuel to rise to the top. From this they argue that none of the fuel put in its aircraft at O'Hare would be burned over the State of Illinois. It was conceded that United's expert witness stated that scientifically, there is no difference between the mixing of cold and hot fuel than there is between mixing cold and hot water (R. 183). The leasing agreements between Shell and United for the facilities at Des Plaines and the facilities leading from Des Plaines to O'Hare are conditioned upon United's continuing use of Shell's fuel. If Shell were required to pay a Retailers' Occupation Tax on sales to United, or if United was required to pay the Use Tax at issue is some $90,000.00 per month or approximately $1,080,000.00 of revenue to the State of Illinois per year.

Finally, it must be pointed out that while Shell pays no sales tax or Retailers' Occupation Tax to the State of Indiana (R. 323), neither United nor American pay any sales or use taxes to any state (R. 235) on the purchase of the fuel involved herein .

ARGUMENT

I.

THE IMPOSITION OF THE ILLINOIS USE TAX ON THE FACTS BEFORE THE COURT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Appellant, in the Illinois Supreme Court, had argued that the essence of the trial court's error was its failure to recognize that fuel is fungible. Appellees pointed out that the Illinois Use Tax does not depend on molecular niceties. The statute, which is controlling, makes no more reference to "fungible" than it does to "consumption" or to "burn-off". Appellant, before the Illinois Supreme Court, was obsessed with an attempt to write into the statute all three of the above terms. The statute uses the term "tangible personal property" and makes no effort to incorporate the novel term "fungible" as appellant suggested.

Likewise, the term "consumption" does not appear in the above definition of "use" or "tangible personal property" as defined by the legislature in the Use Tax Act. Appellant enjoyed a tremendous tax benefit by electing to pay the Use Tax on a burn-off principle. This past practice on the part of appellant led it to urge that the Use Tax Act is a property tax measured by the consumption rate in this State. This position is untenable and would violate the Constitution of the State of Illinois. *Turner* v. Wright, 11 Ill. 2d 161, 142 N.E. 2d 84 (1957); *Helson* v. *Kentucky*, 279 U.S. 245 (1929).

While the scope and effect of the various provisions of the Revenue Act emerged to the present state through a series of decisions of the Illinois Supreme Court akin to a process of evolution, the effect of the commerce clause of the federal constitution has also been subject to a series of decisions which, in effect, could be called evolutionary.

Helson v. *Kentucky, supra,* involved a ferryboat operated in interstate commerce between Illinois and Kentucky. The boat was loaded with gasoline in Illinois but ran through Kentucky water for the better part of its journey before stopping in an Illinois port. Kentucky sought to tax the use of the gasoline actually consumed within its waters. The court held that the tax violated the commerce clause because in essence it was exacted as the price of the privilege of using an instrumentality in interstate commerce—a direct burden on such commerce. But in a series of subsequent cases the court upheld the imposition of a use tax if there was a taxable event preparatory to commitment of the tangible personal property in interstate commerce, e.g., *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167 (1938) (storage and installation of certain equipment), and *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249 (1933) (withdrawal of gasoline from storage). While these later cases limit the reach of the *Helson* principle, it appears that imposition of the Illinois Use Tax on the burned-off basis would still run afoul of that principle. "Burned-off" is just a shorthand way of saying actually consumed, and if the time for levying the use tax is delayed until the fuel is actually consumed, until it is being employed to propel a vehicle on any interstate commerce journey, the Helson case would apply to make such a levy unconstitutional. It would also appear to follow that United's contention that the fuel not actually consumed

within Illinois but loaded aboard the aircraft escapes the use tax through the temporary storage provision is immaterial, because if the use of the fuel has escaped taxation before it has been committed to interstate commerce, it cannot be taxed thereafter, whether there is a temporary storage provision or not.

The first inquiry then becomes whether, upon the facts as stated above, there is an event upon which Illinois may impose the tax without violating the commerce clause. A review of the cases establishes that multiple taxable events are present. The first of these is the storage and withdrawal from storage at the Des Plaines tank (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace,* 288 U.S. 249 (1933), and *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249 (1933). In *Wallace,* Tennessee imposed the tax on "... the (gas) to be withdrawn from storage whether such withdrawal be for sale or other use", Ch. 58, Tenn. Publ. Acts, 1923, as amended, Ch. 67, Tenn. Publ. Act, 1925. The court held that the power to tax property—the sum of all the rights and powers incident to ownership—means the States can tax the successive exercise of two of the powers incident to its ownership, storage and withdrawal from storage, both completed before interstate commerce begins. (Also pointed out in *Edelman, supra*).

United stores and withdraws its fuel at least twice, once at Des Plaines where it allows the fuel to become commingled with that of other airlines, and then to O'Hare, and then withdraws it from storage preparatory to loading it aboard its aircraft and has thus committed taxable events or 'uses' not violative of the commerce clause.

It appears equally certain that United's acts constitute taxable events within the meaning of the Illinois Use Tax as well. Recall the language of the Act, "... 'use' means

the exercise by any person of any right or power over tangible personal property incident to the ownership of that property . . .". Any right or power includes United's loading the fuel aboard its planes, and through its agent, the Lockheed Company, storing and withdrawing from storage. The General Assembly has provided a definition of "use" in the Use Tax Act, but allowed the courts to formulate its own under the retailers' tax.

Attempts to defeat the imposition of the Retailers' Occupation Tax Act were unsuccessful in the following cases: *Young* v. *Hulman,* (1967) 39 Ill. 2d 219, 234 NE 2d 797, so-called agency sales; *Abt* v. *Department of Revenue,* (1966) 34 Ill. 2d 324, 215 NE 2d 243, ice cream sold to boys 14 years old and upwards on consignment; *Marshall & Huschart Co.* v. *Department of Revenue,* (1960) 18 Ill. 2d 496, 165 NE 2d 165, limited agent with authority only to solicit orders, and *Metnick* v. *Department of Revenue,* (1963) 28 Ill. 2d 180, 190 NE 2d 750, delivery of cars to non-residents of the City of Chicago by driving the cars with the customer across the city boundary line.

In *Superior Coal Company* v. *Department of Revenue* (1954) 4 Ill. 2d 459, 123 NE 2d 713, it was held that where a coal company sells its coal at the mine in this State to a railroad company as purchaser, which handles it to points both in the State and out of the State, the coal becoming the property of the railroad for all practical purposes, when it was loaded into the cars of the railroad at the mine, the fact that some of the coal was consigned to and intended for use at destinations out of the State does not preclude the assessment of Retailers' Occupation Taxes based upon such sales. The Court further held that (p. 467) it cannot be contended that the Department of Revenue by its rules and regulations and its construction of the statute is

estopped from making a contention contrary thereto, as the rules and regulations of the Department and its construction of the statute, if erroneous, are not binding upon the Court, and do not operate as an estoppel against the State or to abrogate any of its rights.

II.

THE ILLINOIS USE TAX AS AUTHORATIVELY CONSTRUED BY THE ILLINOIS SUPREME COURT IN THIS CASE DOES NOT RESULT IN AN UNCONSTITUTIONAL TOLL UPON COMMERCE AMONG THE STATES NOR DOES IT RESULT IN MULTI-STATE TAXATION OF THE ACTIVITIES OF APPELLANT.

Appellees accept appellant's concession made before the Illinois Supreme Court that it would be subject to the tax, but resist its contention that the temporary storage provisions give it an exemption that entitled it to a tax-free pass. It is submitted, on the basis of its contention, that the only issue before the Illinois Supreme Court was whether the terms "use" and "consumption" were, under the Use Tax Act, synonymous. The Illinois Supreme Court was faced with a question of statutory construction, more specifically, a definition and interpretation of a legislative definition. The Retailers' Occupation Tax Act, Ill. Rev. Stat. 1961, Ch. 120, Sec. 440-453, was enacted in 1933 to fill emergency revenue needs growing out of the Depression. The Use Tax Act, Ill. Rev. Stat. 1961, Ch. 120, Sec. 439.1 et seq. is an important part of the composite picture of the legislature's intent to raise the basic revenues necessary to operate the various governmental departments of the State of Illinois. It became effective August 1, 1955, and was designed to be complementary to the Retailers' Occupation Tax Act. It was aimed at protecting the Retail-

ers' Occupation Tax base against being reduced by the out-of-state buying of tangible personal property by Illinois users from persons who do not engage in enough Illinois activity to be taxable under an Occupation Tax such as the Retailers' Occupation Tax. It was also aimed at protecting retailers who are liable for the Illinois Retailers' Occupation Tax against competition from those out-of-state retailers who would be beneficiaries of a favorable tax treatment in the absence of a complementary tax.

Appellees feel it is necessary to emphasize the legislative purpose and intention of the temporary storage provision. As appellant points out in its brief to the Illinois Supreme Court at page 27, that provision and the language introducing it read:

> " 'To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:
>
> " '(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State . . .' "

As heretofore pointed out, there is no state in which either Shell Oil Company or United pays any so-called "Sales Tax" on the jet aviation fuel upon which the State of Illinois here attempts to impose a Use Tax. It is submitted that since the temporary storage provision is designed to prevent actual or likely multistate taxation, and since no taxation exists at all in fact, that this exemption does not have any application to the facts before this Court.

It is further submitted that it is not possible to consider and construe the provisions of the Use Tax Act without considering and construing the provisions of the

Retailers' Occupation Tax to which Act the Use Tax Act is complementary. (*Granite City Steel Co.* v. *Dept. of Revenue*, 30 Ill. 2d 552, 558, 198 NE 2d 507 (1964). To attempt to do so, as appellant does, is comparable to performing an autopsy on a missing body.

The Retailers' Occupation Tax Act has been the subject of a considerable volume of litigation and has been interpreted and re-interpreted by the Illinois Supreme Court in a multitude of cases. It is not the intention of appellees to chart the course of that court's long and torturously winding decisions concerning the proper construction and application of those revenue acts, but to call attention to one of the land-mark decisions in this field rendered by the Illinois Supreme Court in the case of *Modern Dairy Company* v. *Department of Revenue*, 413 Ill. 55, 108 NE 2d 8 (1952). In that case the court considered the proper construction in the Act with the original intent of the legislature as to the meaning of certain provisions of the Retailers' Occupational Tax Act. It is significant that that Act imposes a tax on "purchasers for use or consumption", whereas the Use Tax Act imposes a tax only on use. The *Modern Dairy Company* case, *supra*, recognizes and, in fact, establishes that it was the intent of the legislature to draw a distinction between the terms "use" and "consumption". As the Illinois Supreme Court said:

> "The legislature has the power to make any reasonable definition of the terms in a statute, and such definitions, for the purpose of the act, will be sustained. (*Smith* v. *Murphy*, 384 Ill. 34; *Krebs* v. *Thompson*, 387 Ill. 471; *Bohm* v. *State Employees' Retirement System*, 404 Ill. 117). Once the legislative intent is ascertained it should be given effect by the courts unless it is clearly in violation of some provision of the constitution, and captious and hypothetical rea-

soning should no longer be indulged. (*Foltz* v. *Davis*, 68 Fed. 2d 495.) When this court construes a statute and that construction is not interfered with by the legislature, it is presumed that such construction is in harmony with the legislative intent. (*Consumers Co.* v. *Industrial Com.*, 364 Ill. 145.) Conversely, if the legislature, after the courts construe the terms used in an act, attempts by amendment to define those terms as used in that act, the reasonable presumption is that the court's construction was not in accord with the original intent of the legislature. (*Domarek* v. *Bates Motor Transport Lines, Inc.*, 93 Fed. 2d 522; *In re Hurle*, 300 *Mass.* 223, 104 NE 336.) It would then seem incumbent upon the court to reconsider its construction of the act and, if it appeared to be clearly at variance with the interpretation of the legislature, to harmonize the court's construction with the legislative intent.

"In view of the original reason why the legislature adopted the phrase 'to purchasers for use or consumption', in consideration of the purpose and motive of the legislature in passing the Retailers' Occupation Tax Act, the apparent irrelevance of physical consumption to that motive and purpose, the unquestionable efforts of the legislature to correct the court's construction of the meaning of the terms, and the inconsistency of the court's construction of the meaning of the terms evidenced by the belabored decisions finding the purchaser the user or consumer when the purchases were admittedly actually consumed by another, we do not believe that the strict and narrow interpretation heretofore placed on these terms is in accord with the intention of the legislature, and are of the opinion it should no longer be applied.

"The title to this act describes sales 'to purchasers for use or consumption'. It is noted that the terms are in the disjunctive rather than the conjunctive, indicating that the legislature intended 'use' to mean

one thing and 'consumption' something else. Considering the purpose of the Retailers' Occupation Tax Act, it is reasonable to assume the legislature intended the term 'use' to include any employment of a thing which took it off the retail market so that it was no longer the object of a tax on the privilege of selling it at retail." (413 Ill. 55, at 66, 67)

Appellees submit that when the legislature enacted the complementary Use Tax Act, it was not unaware of the Illinois Supreme Court's decision in the *Modern Dairy Company* case, *supra,* in 1952, as the Use Tax Act, as noted above, was not enacted prior to and did not become effective until August, 1955. For the Illinois Court to have accepted appellant's position it would necessarily have had to assume that the legislature was unaware that there was a legal distinction between the meanings of the words "use" and "consumption". (*G. S. Lyons & Sons Lbr. & Mfg. Co.* v. *Dept. of Revenue,* 23 Ill. 2d 180, 177 NE 2d 316 (1961). Some objects of personal property are used by one generation after another and endure, such as precious metals, precious stones, furniture, machinery and homes. Other objects of tangible personal property by their nature are consumed by use, such as food, liquids and medicines. One cannot take a narrow, one-eyed view of when appellant uses its aviation fuel. The testimony in the record indicates that each of its 234 flights that take off from O'Hare Airport are fueled before taking off, and appellant concedes that in so loading the fuel aboard its aircraft, it exercises a right or power over tangible personal property incident to ownership of that property. Appellees insist that when said fuel is loaded on such aircraft it is irrevocably committed to its ultimate use.

Appellant, United, has conceded that Illinois has the authority to impose a tax upon the withdrawal of fuel from

temporary storage. Appellees cannot state it better than appellant did, where at page 62 of its brief to the Illinois Supreme Court, United stated:

> "Under United States Supreme Court decisions, Illinois has constitutional authority to define temporary storage of fuel, and withdrawal of fuel from temporary storage, as a taxable use, even though the fuel is ultimately used to propel vehicles or aircraft in interstate commerce. *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249 (1933); *American Airways, Inc.* v. *Wallace,* 57 F. 2d 877 (M.D. Tenn. 1932), *aff'd* 287 U. S. 565 (1932); *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249 (1933). These cases are very careful to emphasize that a tax upon storage, or upon withdrawal from storage, is permissible only because it falls short of a direct tax upon interstate commerce. *E. g. Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268 (1933)."

At that point, however, appellant sought to establish that the legislature had not chosen to exercise its permissible taxing authority. To do that, United pointed its finger at the Department's Bulletin of June 3, 1963, and took the position that it was that Bulletin upon which appellees relied to establish taxability rather than relying upon the Use Tax itself. The authority to tax the transactions arises by virtue of the Use Tax Act and not by virtue of the Bulletin issued June 3, 1963, as appellant contended. Appellees contended, and the Illinois Supreme Court agreed, that the interpretation of June 3, 1963 was a correct interpretation of the Use Tax Act. The Use Tax Act states unequivocably that the exemption applies only where the tangible personal property "is used solely outside this State". The evidence demonstrated that the fuel withdrawn from storage and placed in the planes at O'Hare Airport was committed to "use" as defined by the Use Tax Act.

The statute makes no reference to any burn-off principle. The Illinois Court in imposing the Illinois Use Tax upon the appellant found its authority to make such an assessment in the language of the statute.

In *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249, 250 (1933), this Court was faced with a factual situation indistinguishable from the instant case. In that case the State of Wyoming levied a use tax of four cents per gallon on all gasoline used or sold in the State of Wyoming. Respondent, Boeing, maintained airplane service for the transportation in interstate commerce of passengers, mail and express. It purchased gasoline both within and without the State which it intermingled and stored in tanks. It contended that the tax could not be applied to gasoline imported from without the State, stored in tanks at the airport and used for filling the tanks of airplanes which then consumed it. This Court stated:

> "* * * Issue is joined on the only question raised by the pleadings, whether the taxation of the gasoline which respondent withdraws from storage and uses for 'filling' its planes imposes an unconstitutional burden on interstate commerce. Hence we confine our decision to that question." 289 U. S. at 251.

In upholding the validity of the tax, the Court said:

> "As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the state or on going out. *It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the state and there-*

fore subject to the tax, when it is withdrawn from the tanks. Compare *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* 288 U. S. 249, 53 S. Ct. 345, 350; 77 L. Ed. 730, decided February 6, 1933, *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232; *Hart Refineries* v. *Harmon,* 278 U. S. 499, 49 S. Ct. 188, 73 L. Ed. 475; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139.

"A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra.* There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to * * * ownership of the gasoline, which falls short of a tax imposed directly on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra,* (279 U. S. 245, 49 S. Ct. 279, 73 L. Ed. 683).' As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

"Despite the fact that the statute as applied is identical in operation with that sustained in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra,* respondent contends that as the statute is written, the tax is one on the consumption of gasoline in propelling its airplanes in interstate commerce, invalid under *Helson* v. *Kentucky, supra.* In that case a Kentucky statute taxing the use of gasoline was applied to that purchased and placed in the tanks of a ferryboat outside the state for use in operating it in interstate commerce. The tax, which was levied only with respect

to the gasoline consumed while the ferryboat was within the state, was held to be invalid as, in effect, a direct tax on the privilege of carrying on interstate commerce.

"But the officers of Wyoming, charged with the enforcement of the taxing statute, are giving no such application to it as was given to that in *Helson* v. *Kentucky, supra,* and it is not suggested that they will. All that has been done or threatened by them, under their interpretation of the statute, infringes no constitutional right of the complainant. In the circumstances, no case is presented, either by pleadings or proof, calling on a federal court of equity to rule upon the correctness of some other construction which may never be adopted by the state administrative officials or by the state courts." 289 U. S. at 251, 252, 253. (emphasis added)

Appellees found the argument of appellant in the court below confusing, if not downright contradictory. For example, at page 65 of its brief to the Illinois Supreme Court, in discussing the right of the State to tax the fuel it loads aboard its interstate flights, it says:

"The basis of such taxation is *not loading aboard the aircraft or consumption in interstate commerce,* but the event of statutory significance—termination of storage and use within Illinois. That is the only event that can sustain the use tax constitutionally, and only the quantity of fuel actually consumed within Illinois can meet this test."

It is submitted that consumption is not what Illinois taxes, but the use that occurs when the storage is terminated and the fuel is committed to its ultimate purpose. To accept the position of appellant, this Court would necessarily have to find that the words "use" and "consumption" are synonymous. The Illinois Supreme Court in its decision did not find these terms to be synonymous.

Appellees wish to emphasize to this Court part of the decision of the Illinois Supreme Court wherein it stated (App. B, p. 14, 15):

> "In language which we find to be plain, simple and unambiguous, the Act has granted exemption to 'the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, *is used solely outside this State.*' (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois. To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is t obe used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution."

In reading appellant's Jurisdictional Statement, particularly pages 22 and 23, appellees are intrigued by the linguistic gyrations through which appellant seeks to remove its operations at O'Hare International Airport from its place of importance in its operations, but concedes that the millions of gallons of fuel involved in this case are imported into the State ". . . only for such period as is necessary to facilitate its interstate and foreign operations from the Chicago airports, . . ." It goes on to state that the fuel is loaded aboard United's aircraft in Chicago:

> "* * * Solely because of its geography, Chicago receives a huge volume of air service from United and other carriers not attributable to Chicago's own traffic. Much of this service is through traffic with no local aspect. For it, Chicago is merely a connecting link in a never-ending series of continuous interstate movements that begin and end outside of Illinois."

As appellees understand that argument, appellant's position is that it is not right to apply the holding and rationale in *Edelman* v. *Boeing Air Transport, Inc., supra,* to the facts before this Court because it is only a geographic accident that required appellant to use huge amounts of fuel aboard its aircraft, and that it is by mere accident Chicago is the hub of United's interstate system; but for this geographic accident, appellant argues, this case would be of little importance; it just doesn't seem right to permit Illinois to impose such a tax because United could not operate its system without having to load large amounts of fuel aboard its aircraft at Chicago because of this damnable geographic accident.

Appellant ignores the FAA requirement that any airplane departing from Chicago must carry a sufficient fuel

reserve to permit them to fly to airports beyond their intended destination and that is one of the primary reasons that planes landing in Chicago headed for further out-of-state destinations must refuel at Chicago.

CONCLUSION

It is respectfully submitted that the Circuit Court of Cook County, State of Illinois, and the Illinois Supreme Court did not commit error in rejecting the contentions of United that it urges here upon this Court. The appellees respectfully pray that the Jurisdictional Statement of the appellant be dismissed and the decision of the Illinois Supreme Court be affirmed.

Respectfully submitted,

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APPENDIX "A."

[Caption Omitted]

OPINION OF TRIAL COURT

This suit was commenced by United Air Lines, Inc. to enjoin the assessment and collection of Illinois Use Tax measured by the amount of fuel owned by United and loaded in Illinois into fuel tanks of its aircrafts to propel them in interstate and foreign commerce.

In arriving at a decision in this case, which as far as I have been able to determine is without precedent in this State, or for that matter in any of the other States, I have been greatly aided by the excellent memorandum of authorities submitted by the attorneys for each of the parties.

The plaintiff contends and the proof establishes that all of this fuel is purchased from Shell Oil Company in the State of Indiana, and is transferred to storage facilities at or near O'Hare and Midway Airports for temporary storage and then loaded into the fuel tanks of the aircraft for use beyond the borders of the State of Illinois. With respect to the fuel designated for use in the planes operating out of O'Hare Field the fuel is transported by pipeline from either Hammond or East Chicago, Indiana, to a storage tank located in DesPlaines, Illinois, which is owned by Shell and leased jointly to United and American Airlines Company. From there it is then transferred by a series of pipelines to O'Hare Field and eventually pumped or placed in plaintiff's aircraft. With respect to Midway, the fuel is transferred by truck and placed in storage and ultimately placed in the planes.

Since the adoption of the Use Tax Act in 1955, until June, 1963, all common carriers were required to pay a tax only on that portion of the fuel actually consumed in the State of Illinois, which concept of liability under that Act has been designated in the trial of this matter as the "Burnoff theory."

On June 3, 1963, the then Director of Revenue, Theodore J. Issacs, ruled the Department's position to be that "tem-

porary storage ends and taxable use occurs when the fuel is taken out of storage facilities and placed in the tank of the airplane, railroad engine or truck. At this point the fuel is converted into its ultimate use, and therefore a taxable use occurs in Illinois." The announced purpose of the bulletin as stated therein was to "clarify the Department's position concerning the temporary storage provisions of the Use Tax Act and their relationship to fuel consumed by a common carrier."

It is this interpretation of the Use Tax Act which is attacked by the plaintiff.

Plaintiff contends that this interpretation is unauthorized by, and contrary to the Use Tax Act, and is violative of Article 2, Section 2; Article 4, Section 13; and Article 9, Section 1, of the Constitution of the State of Illinois; as well as Article 1, Section 8, Clause 3; Article 1, Section 10, Clause 2, of the Constitution of the United States, and the Fourteenth Amendment thereto.

As I understand the position of the plaintiff, it contends that none of the fuel placed in the tank of its planes in Illinois is consumed in Illinois. To support this, plaintiff submits that a regulation of the Civil Aeronautic Board requires that all planes arriving at Midway or O'Hare must carry reserve fuel sufficient to carry them to other airports such as Milwaukee, Detroit, Indianapolis, St. Louis, etc. in case they are not able to land at the local airports. By virtue of flying at an altitude in excess of 30,000 feet this fuel becomes extremely cold and when refueling takes place at local airports, the fuel is much warmer and consequently when injected into the plane rises to the top of the fuel tank. This results, plaintiff contends, in the cold fuel which was in the plane on its arrival, being used first, and which fuel, in all or practically all instances, is more than sufficient to propel the planes out of Illinois.

Plaintiff's evidence that higher temperature of fuel pumped into tanks of its planes upon their arrival in Illinois causes such fuel to flow through and rise above any colder fuel in those tanks corroborates the fact that such natural phenomenon results.

This evidence, however, does not permit this Court to then conclude that therefore none of the fuel pumped in Illinois into those tanks was consumed in propelling plaintiff's planes through the State of Illinois.

Plaintiff then contends that in any event, the Use Tax Act required it to pay that tax only on the amount of fuel consumed in Illinois. The law, however, is otherwise. The Supreme Court of this State has consistently stated that the tax is imposed on the *privilege* of use, not *on the extent of the use* of the privilege. It matters not how much of the fuel is consumed in Illinois. (Bode v. Barrett, 412 Ill. 204; Turner v. Wright, 11 Ill. 2d 161; Hicklin v. Coney, 290 U.S. 169.)

Further it appears from the statute and the law that the definition of "use" extends beyond actual "consumption" of tangible personal property. The statute defines use as follows: "Use means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property." (Ch. 120, Par. 439.2, Ill. Rev. Stat.)

Unquestioned here is the fact that plaintiff owns the fuel that it causes to be stored in the storage tanks in Illinois, from which tanks it further causes such fuel to be withdrawn, then conveyed to the planes, and then pumped into the fuel tanks of those planes in Illinois.

Those facts clearly disclose that plaintiff does "exercise a right or power over tangible personal property (the fuel) incident to the ownership of that property" in Illinois. This

is the exact statutory definition of "use." The tax is properly imposed on the privilege of exercising such dominion. (Turner v. Wright, 11 Ill. 2d 161; Miller Brewing Co. v. Korshak, 35 Ill. 2d 86; Philco Corporation, et al., v. Department of Revenue, Doc. Nos. 40497, 40582, rehearing denied September 1968, not yet officially reported.)

It seems apparent that the facts in this case invoke tax consequence unless plaintiff is excluded by one of the exemptions in the Act. If plaintiff is excluded, it must be by virtue of Subparagraph (d) of Paragraph 439.33 which is as follows:

> (d) the temporary storage, in this State, of property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other property that is used solely outside this State.

At first impression it appears that this provision might indeed exempt plaintiff from tax consequence on fuel which it proves is consumed solely outside the State of Illinois, even though plaintiff in Illinois exercises dominion over that fuel which constitutes the "use" under the Act invoking tax liability.

However, two reasons emerge why plaintiff is not entitled to this exemption.

First, plaintiff has not met the burden of proof the law requires. As stated previously, I cannot conclude from the evidence that *none* of the fuel placed in the tanks of its planes in Illinois was consumed here. In addition, many of the plaintiff's flights originate in Chicago, and the conclusion must be drawn that most, if not all, of these flights take on the bulk of their fuel here.

Second, in my opinion, the exemption intended to be granted by the Legislature is not available to the plaintiff.

As I read that exemption in the context of the purpose of the Act, and the applicable law, the exemption is restricted to that class of tangible personal property which enters the State of Illinois, temporarily rests here, then leaves to be sold or resold outside the State. The property *itself* must be capable of interstate mercantile transaction after it leaves Illinois. Plaintiff's fuel does not meet this test. Plaintiff itself consumes that fuel.

It is my opinion that the interpretation placed on the Act by the then Director of Revenue is authorized by, and in accord with that Act. Both the Act and the interpretation are proper and valid, and do not violate any of the State or Federal Constitutional provisions as claimed by the plaintiff. I so hold.

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APPENDIX "B"

(No. 42042.—Judgment affirmed.)

UNITED AIR LINES, INC., Appellant, *vs.* GEORGE E. MAHIN *et al.*, Appellees.

Opinion filed April 1, 1971.—Rehearing denied October 4, 1971.

UNDERWOOD, C. J. *and* GOLDENHERSH, J., specially concurring.

KLUCZYNSKI, SCHAEFER and DAVIS, J.J., dissenting.

APPEAL from the Circuit Court of Cook County; the Hon. THOMAS C. DONOVAN, Judge, presiding.

PER CURIAM: United Air Lines, Inc., brought this action in the circuit court of Cook County to enjoin the Department of Revenue from assessing and collecting Illinois use tax on aviation fuel loaded at Chicago airports on planes of United which are about to embark upon, or to continue upon, interstate and foreign flights. Named as defendants

were appropriate State officials and United's supplier, the latter having the burden of collecting the tax. Judgment was for defendants and United has appealed, being joined by American Airlines, Braniff Airways and Northwest Airlines, to whom we have granted leave to file briefs as *amici curiae*.

The Use Tax Act, which went into effect in August, 1955, (Laws of 1955, p. 2027,) imposes a tax on the privilege of using in this State tangible personal property that was purchased elsewhere, and was designed to complement the Retailers' Occupation Tax Act, (Laws of 1933, p. 924), under which a tax is imposed upon persons engaged in the business of selling tangible personal property to purchasers for use and consumption. It has been found to be constitutional (*Turner* v. *Wright*, 11 Ill. 2d 161), and it is settled that the Use Tax Act was enacted for the valid purposes of preventing evasion of retailers' occupation tax by persons making out-of-state purchases of tangible personal property for use in Illinois, and of protecting Illinois merchants against diversion of business. At issue here, a matter of first impression, is the construction and application of that portion of section 3 of the Act which, from its inception in 1955, has provided for an exemption from the tax in these terms: "To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * *." Ill. Rev. Stat. 1955, ch. 120, par. 439.3.

Conforming to a practice which has been essentially the same since May, 1953, United purchases and takes delivery of the aviation fuel in question from Shell Oil Company at

facilities of the latter located in Hammond and East Chicago, Indiana. Thereafter, United transports it by common carrier pipeline and trucks to its underground storage facilities at O'Hare and Midway airports in Illinois. Fuel transported by pipeline is first placed in storage tanks at Des Plaines, Illinois, and from there, as needed, is piped to the underground facilities. It remains in the latter only so long as necessary for certain purification processes, and from there is pumped into the tanks of United's aircraft, almost always immediately prior to departure time. United pays the tax on fuel used in intrastate flights, training flights and the like, and the dispute here relates only to fuel loaded on planes departing on interstate or foreign flights, United having 234 such flights each day. All of the aircraft involved must fly over specific routes prescribed by Federal aviation authorities, and thus the amounts of fuel consumed from the time the engines of the planes are started at the Illinois airports until they pass over Illinois borders can be determined with great accuracy.

From the record it appears that there were, and are, numerous common carriers, such as railroads, airlines and trucklines, which, like United, engaged in the practice of purchasing their fuel outside Illinois and storing it here prior to their use of it to propel equipment setting forth on interstate journeys. Immediately after the enactment of the Use Tax Act in 1955, the Department of Revenue uniformly and consistently interpreted and applied the Act to these carriers in such a manner that the incidence and measure of the tax was taken to be only that portion of the fuel consumed in or over Illinois. This construction has been commonly referred to as the "burn off" rule and, during the period of its application, provoked no amendatory legislation. Eight years later, on June 3, 1963, the Department abruptly changed its interpretation and issued a bulletin which announced:

"The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into the tanks of the airplanes, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois.

"If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the Use Tax to their supplier." In short, under this construction all fuel loaded on United's planes at the two airports was deemed to measure the tax, and the exemption in question was construed as having application only if the temporarily stored fuel is transported out of the state for use elsewhere by some means other than placing it in equipment which would consume it.

The present action, which for reasons not apparent in the record has been slow to progress, as soon initiated by United to enjoin the collection of the tax. In substance, it was the position of United that the new construction was erroneous and unreasonable, that the application of the Act as proposed contravenes the Illinois and Federal constitutions, and that it has no use tax liability incident to the fuel in controversy, or, alternatively, that it is liable only for tax measured by the amount of fuel burned in and over Illinois. The trial court rejected these contentions and United has renewed them here.

To support its contention that the "burn off" construction indulged in by the Department for 8 years should continue to prevail, United relies principally upon the rule of statutory construction that courts, in determining the proper construction of an ambiguous statute, will consider

and give weight to the contemporaneous construction placed upon a statute by the governmental officers or departments charged with the duty of administering it, and will usually adopt such contemporaneous construction where it is a reasonably permissible construction, has the implied assent of the legislature, and has been consistent, uniform and long continued. See: *People ex rel. Spiegel* v. *Lyons*, 1 Ill. 2d 409; *Illinois Bell Telephone Co.* v. *Illinois Commerce Com.*, 414 Ill. 275; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 100 L. Ed. 441, 76 S. Ct. 416; *Cory Corp.* v. *Sauber*, 363 U.S. 709, 4 L. Ed. 2d 1508, 80 S. Ct. 1331.) For reasons later to appear, we do not believe the statute is ambiguous; but even if ambiguity be assumed, the rule of construction relied upon cannot be employed in this case. As the rule itself recognizes, executive or administrative construction is not binding on the courts if it is erroneous (*P. H. Mallen Co.* v. *Department of Finance*, 372 Ill. 598; *Superior Coal Co.* v. *Department of Revenue*, 4 Ill. 2d 459), and in our opinion the "burn off" construction is constitutionally impermissible.

That construction of the statute, to repeat, measured the tax by the amounts of fuel consumed by United's planes in and over Illinois as they proceeded on their interstate journeys. And while it is difficult to see how such a construction could be derived from statutory language which grants exemption to temporarily stored property that is used "solely outside of this State," it is sufficient to say that the construction runs afoul of the commerce clause of the United States constitution. Decisive and binding authority for this conclusion is found in *Helson* v. *Kentucky* (1929), 279 U.S. 245, 73 L. Ed. 683, 49 S. Ct. 279, determined under facts which, in effect at least, cannot be distinguished from those of the present case. Involved there was an Ohio river ferry operated exclusively in interstate commerce between Kentucky and Illinois. Gasoline used to power the

ferry was purchased and delivered in Illinois, situs of the residence and business of the operator, and it was stipulated that "75 per cent of this gasoline was actually consumed within the limits of Kentucky, *but all of it in the making of interstate journeys.*" (279 U.S. at 248; emphasis added.) Issue arose when Kentucky sought to impose a tax on the gasoline consumed within its limits under a statute which, *inter alia,* authorized a tax on gasoline purchased "without the state" but used "within the state." Overruling Kentucky courts, the Supreme Court found under the circumstances that the gasoline was an instrumentality of interstate commerce, thus causing the tax to be "exacted as the price of the privilege of using an instrumentality of interstate commerce," (279 U.S. at 252), and struck it down as being an invasion of the exclusive power of Congress to regulate such commerce.

Our own statute must be held subject to the same infirmity when the amount of fuel consumed, or "burned off," within the limits of Illinois is made the incidence and measure of the use tax. All of the fuel over which controversy has arisen is consumed in the making of interstate journeys, and once the engines of a plane are started in Illinois, it can be said unequivocally that the fuel becomes an instrumentality of interstate commerce. Under the compulsion of *Helson,* to impose a tax based upon consumption within Illinois is to exact a tax on the privilege of using the fuel in interstate commerce. (*Cf. Shell Oil Co.* v. *State Board of Equalization,* 64 Cal. 2d 713, 414 P. 2d 820, 827; *Texas Gas Transmission Corp.* v. *Benson* (Tenn.), 444 S.W. 2d 137; *W. R. Grace & Co.* v. *Comptroller of the Treasurer,* 255 Md. 550, 258 A. 2d 740) And there is more here than was involved in *Helson.* United's planes pass over many States. They do not refuel in each State but fuel loaded here is necessarily used or consumed over and within each State. Should every State wherein fuel is consumed seek to impose a use tax

measured by the amounts of fuel consumed within its borders, an intolerable burden on interstate commerce would result. *Cf. United Air Lines, Inc.* v. *Illinois Commerce Com.*, 32 Ill. 2d 516.

Seeking to avoid the impact of *Helson*, United argues that the placing and presence of the fuel in departing planes is but a continuation of temporary storage; that the burning of fuel in and over Illinois is simultaneously consumption and the termination of temporary storage, and that the release from storage as the plane is operated in Illinois is a local event, or use, properly taxable by Illinois. Or, to put it another way, United asserts that all fuel placed in the tanks of its planes continues to be exempt under the temporary storage provision of our Act, and that the exemption is lost, and the fuel subject to the tax, only to the extent of the fuel released from the tanks for consumption in and over Illinois.

While we entertain grave doubts that *Helson* could be evaded by the fine distinction between "consumption" and "simultaneous consumption and termination from storage," and believe it probable that the fuel becomes an instrumentality of interstate commerce when it is loaded on a plane, the basic premise of the construction advanced is a faulty one. The placing and presence of the fuel in the tanks of aircraft may be "storage" in a special or technical sense, but we think it clear that the legislature did not intend for the temporary storage exemption to extend to "storage" of such nature. It is axiomatic that the words used in a statute should generally be given their plain and ordinary, or commonly accepted meaning, unless to do so would defeat the manifest intent of the legislature. (See: 34 I.L.P., Statutes, § 117.) Here the statutory references are to "the temporary storage, in this State," of tangible personal property, and to such property "stored here temporarily." The noun "storge" is specifically de-

fined as meaning "the act of depositing in a store or warehouse for safekeeping" and, consistent therewith, the verb "store" is defined as meaning "to deposit in a store or warehouse for safekeeping." (See: Webster's New Twentieth Century Dictionary, 2d ed., pp. 1795 and 1796; *Bandosz* v. *A. Daigger and Co.*, 255 Ill. App. 494, 499.) It may be observed, too, that such meanings are consistent with the legislative purpose of exempting only temporarily stored property used solely outside Illinois. Fuel is not placed or present in the tanks of an airplane for the purpose of safekeeping, and there is no rule of construction which permits a court to say that the legislature did not mean what the plain language of a statute imports. (*Western National Bank of Cicero* v. *Village of Kildeer,* 19 Ill. 2d 342.) Appropriate here, in light of United's effort to attribute a special or technical meaning to the language of the Act, is the observation in *People* v. *Day,* 321 Ill. 552, 555, which states: "What the framers of a statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point to be considered. The inquiry is what, in fact, they did enact, probably without anticipating the existence of such facts." We conclude that the "burn off" construction was improper and that it cannot prevail as United insists.

Next to be determined is the proper construction of the temporary storage provision of the Act and, in relation thereto, the positions and arguments of the parties focus upon *Edelman* v. *Boeing Air Transport, Inc.* (1933), 289 U.S. 249, 77 L. Ed. 1155, 53 S. Ct. 591 In that case the State of Wyoming imposed a tax on all gasoline used or sold in the State. Boeing, which operated out of two airports within the State, maintained an air service for transporting passengers, mail and express in interstate commerce. It purchased gasoline both within and without the State which was intermingled and stored in tanks at the airports from

whence it was either sold or put into Boeing's own planes. Tax liability was admitted for the portions of the gasoline sold or used in intrastate flights, but, in apparent reliance on *Helson*, it was contended that the tax could not be validly applied to so much of the gasoline imported from outside the State as was loaded from the storage tanks into planes that consumed it in interstate flights. Rejecting this contention, the court said: "As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the State and therefore subject to the tax, when it is withdrawn from the tanks. * * * A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra.* [288 U.S. 249.] There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to * * * ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky,* 279 U.S. 245. As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations." 289 U.S. at 251, 252.

Our own statute defines a taxable "use" as being "the exercise by any person of any right or power over tangible personal property incident to the ownership of such property" (Ill. Rev. Stats. 1961 and 1969, ch. 120, par. 439.2), and it is the contention of defendants that a taxable use occurs when United withdraws its fuel from storage and places it in its planes. United agrees that either storage (*Wallace,* 288 U.S. 249), or withdrawal from storage (*Edelman*), are the exercise of rights which might have been constitutionally taxed under our Act. It insists, however, that our legislature waived the right to tax either even when it enacted the temporary storage provision, and from this position argues that if the loading on the aircraft is intended as the taxable event, then the tax is constitutionally improper as being imposed upon an integral activity of interstate commerce. (*Cf. Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 98 L. Ed. 583, 74 Ct. 396; *Puget Sound Stevedoring Co.* v. *Tax Com.,* 302 U.S. 90, 82 L. Ed. 68; *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U.S. 422, 91 L. Ed. 993; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 91 L. Ed. 80.) But both parties, in our view, oversimplify the problem by failing to consider the specific language of the Act, which we are bound to construe so that all of its provisions are given effective meaning. *People ex rel. Barrett* v. *Barrett,* 31 Ill. 2d 360; *Pliakos* v. *Liquor Control Com.,* 11 Ill. 2d 456.

In language which we find to be plain, simple and unambiguous, the Act has granted exemption to "the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, *is used solely outside this State.*" (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois.

To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circumstances, the "storage" becomes something more than a "temporary storage" for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution.

Contention is next made that the Department, in applying the tax, has done so in such a manner as to violate the provision of section 1 of article IX of the Illinois constitution which requires taxation to be "uniform as to the class upon which it operates." However, there is no proof in this record that there has been a lack of uniformity or discrimination within the class of taxpayers affected, and as a consequence there is nothing which permits us to determine the issue sought to be raised. It may be added, too, that this contention is erroneously premised on a theory that the fuel stored by United is eligible for the protection of the temporary storage exemption, and that the tax has been laid on either the withdrawal of the fuel from storage or

its transportation outside the State. In either event, the constitutional claim made must be found to be without merit.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Mr. Chief Justice Underwood specially concurring:

I agree that Illinois may constitutionally collect the tax imposed in this case on all of the fuel loaded on United's planes at the airports. I am, however, not at all certain that application of the "burn off" rule would, as the opinion indicates, be constitutionally impermissible if the statute so provides. In my opinion the statute does not so provide, but rather clearly exempts the fuel in question here only when "used solely outside this State". I do not consider discussion of the "burn off" rule necessary to the decision, and would affirm on what I consider to be the plain meaning of the statutory language.

Mr. Justice Goldenhersh joins in this concurrence.

Mr. Justice Kluczynski, dissenting:

I disagree with the majority's conclusion that the interpretation of section 3 of the Use Tax Act (Ill. Rev. Stat. 1955, ch. 120, par. 439.3) as originally given by the Department of Revenue was erroneous and that such an interpretation would be violative of the commerce clause.

The events of storing fuel in Illinois or the taking of fuel from storage in Illinois are constitutionally taxable under our Act because the events are complete before interstate commerce begins. (*Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U.S. 249, 77 L. Ed. 730, 53 S. Ct. 345; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 77 L. Ed. 1155, 53 S. Ct. 591.) Thus a tax measured by the value of the entire tank of fuel is constitu-

tionally permissible and it follows that a tax measured by something less would also be permissible.

Section 3 of the Act in part provides: "To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * *." (Ill. Rev. Stat. 1955, ch. 120, par. 439.3.) I believe that this section exempts that portion of the fuel which "stored here temporarily, is used solely outside this State." The intent of the owner when the fuel is placed in the tanks of the airplane is that a certain portion will be consumed in the State of Illinois. This portion is no longer exempt under section 3 and therefore taxable. The remainder of the fuel is stored in the tanks for use solely outside the State of Illinois and keeps its exempt status while in the tanks.

Such an interpretation was given to the exemption from its enactment in 1955 until June 3, 1963, when the Department of Revenue changed its position so that a tax, measured by the value of the entire tank of fuel, is imposed when fuel is taken out of a storage tank and placed into tanks of the airplane. I believe, however, that the original construction given to the statute is correct for the following reasons: First, it is a reasonable construction of the wording of the exemption which admittedly is capable of other reasonable interpretations when applied to the facts of this case.

Secondly, the construction given to the statute at the time of enactment by the agency administering the statute is entitled to substantial weight. Before the Governor signed the Use Tax Act in July, 1955, the Department of

Revenue, in response to an inquiry by the Honorable Paul Randolph (member of Illinois House of Representatives, Chairman of the Revenue Committee of the House and member of the joint House-Senate Conference Committee which recommended the Use Tax Bill for passage) stated in a letter to him its intent as to how it would administer the Act. The letter was written on July 12, 1955, by Willard Ice, then Supervisor, Rules and Regulations Division of the Department of Revenue, and stated that if a carrier purchased fuel outside of the State "and some of the items or units thereof (such as so many gallons of gasoline) are used in Illinois and some of the items or units thereof (such as so many gallons of gasoline) are used outside of Illinois, the carrier would be liable for the use tax on the items used in Illinois, but not on the items used outside of Illinois assuming that the carrier keeps adequate records to segregate the non-taxable from the taxable items."

Thirdly, the exemption as originally construed, had been applied continuously and uniformly for an extended period of time. And finally, during the eight years when the Department's original construction was in effect, the Illinois legislature amended section 3 of the Use Tax Act, at least once each session without repudiating the Department's construction. Thus, the legislature gave implied consent to the construction by nonaction on its part. See: *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 385 U.S. 182, 17 L. Ed. 2d 281, 87 S. Ct. 359; *Cory Corp.* v. *Sauber*, 363 U.S. 709, 4 L. Ed. 1508, 8 S. Ct. 1331; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 100 L. Ed. 441, 76 S. Ct. 416; *People ex rel. Spiegel* v. *Lyons*, 1 Ill. 2d 409; *Illinois Bell Telephone Co.* v. *Commerce Com.*, 414 Ill. 275.

For these reasons I would reverse the judgment of the circuit court of Cook County.

Schaefer and Davis, J. J., join in this dissent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-862

UNITED AIR LINES, INC.,
Appellant,

vs.

GEORGE E. MAHIN, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 16.4 of the Rules of the Supreme Court of the United States, appellant United Air Lines, Inc. ("United") files this brief in opposition to appellees' Motion to Affirm the judgment of the Supreme Court of Illinois.

INTRODUCTORY STATEMENT

The appellees' discussion of the "Issues Presented" (Motion to Affirm, pp. 2-5, hereinafter "Motion") concentrates on the issues of statutory construction which have been authoritatively decided by the Illinois Supreme Court. Indeed, most of their Motion (pp. 6-8, 13, 17-21, 25-26) is devoted to discussing these issues. Their purpose for this approach is obscure.

It cannot be the belief that United has waived the constitutional issues because the record is clear and appellees in fact concede that these were presented and adjudicated below (Motion, p. 4, App. 2, 5, 8, 10-14).

It cannot be that the statutory construction by the Illinois Supreme Court disposed of the case in such a way that there remain no constitutional issues. The Illinois Use Tax Act, as construed by the Illinois Supreme Court, places the incidence of the Illinois use tax on the loading of fuel aboard United's aircraft immediately prior to the commencement of interstate and foreign journeys. This squarely creates the question, raised by United in its Jurisdictional Statement, whether such a tax offends the Commerce Clause.

In addition to that constitutional issue, there is the subordinate one whether *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929), precludes Illinois from taxing only that portion of the fuel loaded at Chicago by United which is consumed in Illinois. On this latter issue, the Illinois Supreme Court is split among the two *per curiam* judges who believed that *Helson* precluded taxation of Illinois-laden fuel measured by the amount burned over Illinois, the two concurring judges who were not sure, and the three dissenting judges who concluded that the burn-off rule did not violate the Commerce Clause.

Coordinate with the appellees' misplaced attention with the already decided statutory issues is their scant response to the constitutional issues raised in United's Jurisdictional Statement. Although their Motion does discuss the *Helson* case and *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), the appellees make no attempt to distinguish the numerous cases of this Court cited as controlling authorities by United in its Jurisdictional Statement (*e.g.*, pp. 12-14, 16-18, 20-22).

SPECIFIC ISSUES RAISED BY THE MOTION TO AFFIRM

1. What is labeled by appellees as an "Additional Statement of Fact" (Motion, pp. 8-12) can be better characterized as an argument based on inference and innuendo rather than upon the uncontroverted facts in the record. Appellees speak of the creation of "the appearance of a sale of fuel taking place in Indiana" (*id.*, p. 9). Before trial, however, appellees stipulated that title, delivery and risk of loss to all the fuel in question passed to United in Indiana. Based on that stipulation and additional evidence introduced by United at trial, the Trial Court specifically found that the "proof establishes that all [of the fuel] is purchased from Shell Oil Company in the State of Indiana" (Jurisdictional Statement, App. 1). Although this finding was not the subject of a cross-appeal by appellees to the Illinois Supreme Court, they did raise the factual issue of where the fuel was purchased in their brief and arguments before that Court. That Court, in turn, explicitly adopted the finding of the Trial Court on this factual issue (Jurisdictional Statement, App. 6-7).

In their factual summary, appellees fail to mention that it is impossible for Shell to deliver aviation fuel to the Chicago area airports except through its terminal in northern Indiana, which serves several midwestern States. That terminal has performed the same function for Shell since 1928, and United has taken delivery of aviation fuel at that terminal for the Chicago (and other Midwest) airports since 1953, two years prior to the passage of the Illinois Use Tax Act.*

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* Appellees' statement (Motion, p. 10) that "[i]t would be physically possible for Shell to deliver the fuel . . . at O'Hare Airport" may be misleading. Shell's private pipeline from its Wood River refinery terminates at its Hammond, Indiana storage facilities. For Shell to deliver the fuel to United at O'Hare and Midway airports would require Shell to use the facilities of common carriers between its northern Indiana terminal and those airports, just as United now does.

2. Appellees rely principally upon *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), and assert that that case is indistinguishable from the instant one (Motion, pp. 23-25). As United noted in its Jurisdictional Statement (pp. 14-15), *Edelman* and certain related cases, all decided in the mid-30's, are fundamentally different from the present case, because in all of them the legal incidence of the state tax was explicitly upon the storage of fuel or upon its withdrawal from storage or upon both events.* In the present case, in contrast, the incidence of the tax cannot fall upon the storage of fuel or its withdrawal from storage because, according to the decision below, the critical event under the Illinois use tax is the placing of the fuel into a tank of an airplane, railroad engine or truck after its withdrawal from statutorily-exempt storage. Under the temporary storage provision of the Use Tax Act, as construed by the Illinois Supreme Court, if the fuel is placed in another type of tank or pipeline and is transported from the State "neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax." (*Per curiam* opinion, Jurisdictional Statement, App. 15.)** It is *only* if the fuel is placed in the tanks of aircraft and other vehicles about to depart in interstate journeys that the use tax is triggered. Thus, the "practical operation" or "operating incidence of the tax" (*American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965)), actually falls upon the loading of the fuel into

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* Appellees clearly recognize that the incidence of the tax in *Edelman* was upon the withdrawal of the fuel from storage. This is evident from the emphasis they added to their quotation from the *Edelman* case on pages 23-24 of their Motion.

** The argument by appellees (Motion, p. 15) that United withdraws its fuel from storage at least twice prior to loading it aboard its aircraft is obfuscatory. Under the Illinois Supreme Court's opinion such "withdrawals" are a continuation of exempt storage because the fuel is not placed in "equipment which would consume it" (Jurisdictional Statement, App. 8).

the tanks of United's aircraft, a point which appellees apparently concede.*

Since the incidence of the Illinois use tax falls upon the act of loading the fuel aboard United's aircraft, rather than upon the storage of the fuel or its withdrawal from storage, the *Edelman* case and its progeny are inapposite in the instant situation. Rather, as discussed at length in United's Jurisdictional Statement (pp. 12-15), the present case is controlled by such later decisions of this Court as *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 166-69 (1954), the Stevedoring Cases, and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946). See also *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951) (invalidating a privilege tax** in the form of franchise tax upon a corporation engaged in interstate commerce). As previously noted, appellees make no effort whatsoever to distinguish any of these more recent precedents of this Court set forth in United's Jurisdictional Statement.

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* On page 21 of their Motion, the appellees state:

". . . appellant concedes that in . . . loading the fuel aboard its aircraft, it exercises a right or power over tangible personal property incident to ownership of that property. Appellees insist that *when said fuel is loaded on such aircraft* it is irrevocably committed to its ultimate use." (Emphasis added.)

Similarly, *id.*, at p. 22, they state "[t]he evidence demonstrated that the fuel withdrawn from storage and placed in the planes at O'Hare Airport was committed to 'use' as defined by the Use Tax Act". And *id.*, at 25, "[i]t is submitted that consumption [of the fuel over Illinois by the departing flight] is not what Illinois taxes, but the use that occurs when the storage is terminated and the fuel is committed to its ultimate purpose." In the context of this argument, "ultimate purpose" means loading of the fuel into the tanks of United's aircraft immediately prior to their interstate and foreign departures.

** As noted in the Jurisdictional Statement (p. 4), the Illinois use tax is likewise a privilege tax. *Turner* v. *Wright*, 11 Ill.2d 161, 164-65, 142 N.E.2d 84, 86-87 (1957).

3. Appellees apparently take the position that the Illinois use tax may constitutionally be imposed upon all of the fuel loaded in Chicago because, so their argument goes, there is no multistate taxation of the fuel (Motion, p. 18). Appellees' contention is factually and legally erroneous.

The fuel loaded by United in Chicago will be subject to multiple state taxation if the decision of the Illinois Supreme Court is affirmed. The record shows that the purchase of the fuel by United in Indiana is subject to the Indiana gross income tax (Jurisdictional Statement, p. 6). Like the Illinois use tax, the Indiana gross income tax is a privilege tax. *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938); *Gross Income Tax Division* v. *Bartlett*, 228 Ind. 505, 93 N.E.2d 174, 177 (1950); *Indiana Creosoting Co.* v. *McNutt*, 210 Ind. 656, 5 N.E.2d 310, 313 (1936). The Indiana tax is measured by the gross receipts of sales (Burns Ind. Stat. Ann. tit. 64, ch. 26, § 64-2601(m) (1971 Supp.)), which is the measure identical to that of the Illinois use tax. While the legal incidence of the Indiana tax is, in the first instance, upon the seller, Indiana law permits parties by contract to shift the burden of the tax to the purchaser. See *Herlihy Mid-Continent Co.* v. *Northern Indiana Public Service Co.*, 245 F.2d 440, 443 (1957). This is precisely what has occurred in the instant case where the fuel purchase contract between Shell and United specifically requires United to pay the Indiana tax as a separate item.

Moreover, regardless of legal incidence, the Indiana tax arises from the sale of the fuel from Shell to United which commences the interstate movement of it to the Chicago airports, where it rests only for as long as is necessary for purification and United's operational needs, before it continues its interstate journey in the tanks of aircraft.*

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* This Court has frequently struck down privilege taxes imposed upon activities that are a part of interstate commerce (*E.g.*, *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951); *State Tax Comm'n*

Appellees obscure the issue of multiple taxation when they note that the Indiana tax is not a sales or use tax, as is the Illinois tax. It is not surprising that appellees cite no authority supporting this distinction, because the prohibition of the Commerce Clause against multiple state taxation has never been construed to require that the state taxes be the same or similar. Even so, regardless of labels, it is clear that both the Illinois and Indiana taxes are in substance the same—privilege taxes which are measured by the same gross receipts. Thus, if the Illinois use tax is sustained in its present unapportioned application to all fuel loaded in Illinois, United will be subject to direct, unapportioned multiple state taxation which has been consistently prohibited by this Court. See *Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 438-440 (1939) and cases cited therein; *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938);* cases cited in Jurisdictional Statement, pp. 20-22.

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v. *Interstate Natural Gas Co.*, 284 U.S. 41 (1931); *Ozark Pipe Line Corp.* v. *Monier*, 266 U.S. 555 (1925)), particularly where the tax imposed was not apportioned in accordance with the taxpayer's activities in the state. *E.g., Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 438-440 (1939) and cases cited therein.

* In *Adams Mfg Co.*, this Court invalidated the very Indiana gross income tax for which United bears the burden in the present case on the ground that, as applied to interstate sales, the tax raised the specter of potential multiple interstate taxation. This Court reasoned as follows:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure *without apportionment*, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may *in substance* be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." 304 U.S. at 311. (Emphasis added.)

To the same effect, also striking down the Indiana gross income tax as applied to interstate sales, see *Freeman* v. *Hewit*, 329 U.S. 249 (1946).

CONCLUSION

For all of the foregoing reasons, United requests this Court to deny the appellees' Motion to Affirm, and, because of the substantial constitutional questions presented, to note probable jurisdiction and grant plenary review of the instant case.

Respectfully submitted,

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